No. 15915

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Properties
MOULIN ROUGE, INC., a corporation and successor in interest to MOULIN ROUGE, a limited partnership,

Bankrupt.

In the Matter of
MOULIN ROUGE, a Limited Partnership,

Bankrupt.

ROSEHEDGE CORPORATION, a corporation,

Appellant,

vs.

MILLIE STERETT,

Appellee.

APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF.

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APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF.

Preliminary Statement.

After Appellant's Opening Brief was filed, Appellee's application to supplement to record was granted[1] to include the Reporter's Transcript of the proceedings and sale held before the Referee on September 6, 1957. The matter was then remanded to the District Court for correction of indicated differences regarding such transcript.

Appellee's brief, filed herein, includes the supplemental record, but before its correction.

Appellee's Brief, we submit, noticeably has failed to answer, or refute the contentions, arguments and authorities presented in Appellant's Opening Brief. In certain instances Appellee's Brief incorrectly states the record. On other occasions it makes statements unsupported by

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[1]Order dated December 10, 1958, and Order dated February 18, 1959.

or contrary to the record. It contains partial, incomplete or isolated quotations from the record, which when completed, or taken in their true context, convey a meaning different than that asserted by Appellee. These will be alluded to subsequently.

Supplemental Briefs are permitted herein. Pursuant to Order of this Court Appellant is combining its Supplemental and Reply Brief.

This Court's Order, dated December 10, 1958 (supplementing the record herein) was made "subject to the qualification that this Order is not to be construed as a determination or adjudication as to whether the portions so added by Appellee are relevant or material to the appeal."

This Court, by Order dated February 18, 1959, remanded the cause to the District Court for correction of the supplemental record, with authority to refer the matter to the Referee, for advice and assistance. Said Order also provided, "if as a result of the proceedings herein authorized there is added to the record matters not theretofore brought to the notice of the District Court, the latter shall reconsider its Orders now under review in this Court, with or without further hearing, and confirm or modify the same, or vacate such Orders, and enter new Orders herein, subject to review in this appellate cause on the present record and briefs as appropriately supplemented."

The record was settled before the Referee, who made the following corrections and additions to the Reporter's Transcript of September 6, 1957:

1. The word "two" found on page 26, line 20 of said Transcript was changed to read "ten."

2. The word "stipulation" found on page 14, line 8, of said Transcript was changed to read "written bid."

3. On page 21, immediately following line 9 of the aforesaid Transcript there was added the following:

"That the following proceedings had and the statements made in open court and while the Court was still in session, and before any recess had been taken, to wit:

"Referee: By the way, Mr. Katz, who is S. Kohn?

"Mr. Katz: S. Kohn is a secretary in my office and is making this bid as a matter of convenience."

On May 28, 1959, the District Court made an Order[2] adopting the Referee's findings and changes, and confirmed its Original Order under review. This later Order. and the record, has been returned to this Court.

To justify its Order, the District Court states:

". . . that after a Notice of Appeal has been filed, this Court completely loses jurisdiction of the cause, except to the extent that the Court of Appeals itself may mandate to this Court some further task in connection with the case on appeal. Orderly Court procedure demands that this rule be rigidly, meticulously and scrupulously observed, for otherwise we should have the unseemingly spectacle of a higher court and a lower court simultaneously sitting in the same case.

"The present task of this Court, therefore, is an extremely narrow one. We are to decide whether, in the light of the three microscopic changes in the Record made by the Referee, this Court's own orders should also be changed.

"To ask the question is to answer it. . . ."

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[2]Appellant took a Review from the Referee's Order upon the ground that correction No. 3 was incomplete, and disregarded the undisputed evidence relating thereto, but the District Judge made his order, without any hearing upon or determination of said Review, and returned the record to this Court. To avoid further delay, Appellant is filing this Brief based upon the record as made by the Referee, and confirmed by the District Court.

The District Court ruled that the three "microscopic" changes were "to minuscule" to warrant any modification, or vacation of the original Order, and confirmed the same. (The District Court ignored the fact that the Reporter's Transcript had not been certified to and was not before the Court upon Review in October 1957.)

In construing this Court's Order, the District Court erroneously held that it was *limited solely* to the *three* corrections in the *reconsideration* of its Order under review, and otherwise lacked jurisdiction in the matter. (Actually only a portion of its Order is under review by this Court.) [See R. pp. 137-141.][3]

We submit that this Court never intended its Order to be so narrowly limited or construed; rather it intended that the District Court reconsider its Order under review (portion), upon *all* the evidence, *including such evidence not before it when its Order dated November 7, 1957, was made.* This would include the entire Reporter's Transcript of September 6, 1957, which was neither certified to, nor before it when the Review was determined. [See Typewritten Referee's Certificate on Review, pp. 46-47; also Reporter's Certificate in Reporter's Transcript of September 6, 1957, p. 525, dated October 28, 1957, the same date on which the Review was heard and argued.] Had the District Court reviewed the Reporter's Transcript it readily would have seen that the "quotation" set out in Appellee's "Memorandum of Law in Support of Petition for Review of Referee's Order of September 23, 1957" [R. pp. 124-125], which the District Court used as the basis of the portion of the Order now upon appeal, cannot be found in the Reporter's Transcript. This factor alone should have caused the District Court to give serious reconsideration to that portion of

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[3]All reference to R. as used herein, refer to the *printed* Transcript of Record.

its Order now under review. It clearly would have demonstrated that the isolated portion of the Referee's Certificate set out in Appellee's "Memorandum" [R. pp. 124-127] was used therein by the Referee *by way of example only, and not as a statement of fact occurring at the sale.*

Furthermore, the Order of remand, restored jurisdiction to the District Court for all purposes set forth in such Order, including the authority to reconsider on the merits that portion of the District Court's Order now upon appeal. (36 C. J. S. Fed. Courts 488; *Gandie v. Porto Rico etc. Co.,* 2 F. 2d 641; *Illinois Bell Telephone Co. v. Slattery,* 98 F. 2d 930, 932; *Union Pac. Ry. Co. v. Johnson,* 249 F. 2d 674, 676.)

The District Court's Order also approved the following Referee's Comment: "this Referee will not recommend to the District Court that any changes be made in the findings heretofore made" relying upon *Kennedy v. United States* (9 Cir.), 115 F. 2d 625, holding that Rule 75(h) gives to the District Court the power to correct the record only as to what occurred, and "not to add or cause to be added to the record findings which were never made." We agree. Appellee was not present either in person or by counsel at the Referee's sale on September 6, 1957, [R. pp. 100, 117, 119, 131, 132; Rep. Tr. p. 2, line 16, to p. 3, line 21].[4] No adversary, or other proceedings, were had at said hearing between Appellant and Appellee, and no issue was presented to or determined by the Referee involving the priority or validity of their respective chattel mortgages, or pertaining to Appellee's present contention that Appellant's chattel mortgage was satisfied and extinguished by the bid of and sale to S. Kohn. No findings therefore were required upon such matters which were *not* before the Referee, and upon

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[4]All references to Rep. Tr. as used herein refer to typewritten Reporter's Transcript of September 6, 1957, before the Referee.

which no adversary proceedings were had. It is axiomatic that in a proceeding to correct the record, the Referee could not make findings upon *matters which never occurred* during, and upon which no issue was presented or determined at the September 6, 1957 hearing and sale; neither could he add to the record *"findings which were never made."*

The undisputed facts then existing, or which occurred at the September 6, 1957 hearing and sale are set forth in Referee's "Order Confirming Sale" [R. pp. 66-74], and in the District Court's "Order Confirming, Affirming and Approving Referee's Order, Dated September 23, 1957, as Modified by Court." [R. pp. 128-133.] This District Court Order states "that the statements of fact and the recitals of the proceedings had, as set forth in the aforementioned Referee's Order, dated September 23, 1957, are correct, and by reference are made a part hereof. . . ." [R. pp. 130-131.]

In the absence of adversary proceedings before the Referee, or before the District Court upon review, covering disputed questions of fact, these recitals or statements of fact were and are sufficient. (*In re Trinbal,* 55 F. 2d 165; *MacNeal v. Barlen,* 143 F. 2d 230, 232; *In re Hedgeside Distillery Co.,* 123 Fed. Supp. 933; *Simpson Bros. v. Dist. of Columbia,* 179 F. 2d 430, 434; *Huffman, et al. v. Norfolk, etc., et al.,* 71 Fed. Supp. 564.)

Comment on Appellee's Statement of Case.

The Statement of Case in Appellant's Opening Brief, with appropriate record references, we submit, fully, fairly and correctly sets forth the factual matters involved in this appeal. Appellee neither disputes nor denies the same. Appellee's "Statement of the Case" is incomplete and inaccurate. She seeks to justify her contentions by isolated, incomplete quotations taken from the Reporter's Transcript; by inaccurate statements of the rec-

ord, and by reference to matters which *de hors* the record on appeal. We will now review Appellee's Statement of the Case.

Appellee's contention that no action was taken to foreclose Appellant's Chattel Mortgage (if material herein) ignores the fact that foreclosure was enjoined. [R. p. 92.]

Appellee's assertion that Appellant and LeRoy "informed both Referee and Trustee that they desired to bid at any sale, and to utilize the value of their lien claims upon such bids and in payment of the purchase price, if they were successful bidders," is taken out of context, and without reference to time or circumstances when made.

Such statement *was not made at the sale,* but was made approximately *a year and a half prior thereto.* At *that* time there was pending and undetermined the LeRoy and Rosehedge Motion[5] and Trustee's Objection thereto, challenging the validity of their lien claims upon the real property. [R. pp. 97-106; pp. 57-66; pp. 3-20.] The Debtors had just been adjudicated bankrupts; no feasible plan of arrangement had been presented or was available; rapidly mounting unpaid obligations and expenses of the Receiver (Trustee) created serious problems, and the only solution appeared to be an immediate sale of the bankrupts' property—even before the completion of the hearing and determination of the LeRoy and Rosehedge Motion and Trustee's Objections thereto. [R. p. 97.] During this crisis Trustee filed a Petition for Authority to Sell, free and clear of liens, the property of the Bankrupt, and another Petition for Authority to Sell, said property in accordance with the Bankruptcy Act. [R. pp. 98-99.] Faced with the possibility of a sale before their Motion and Trustee's Objections were heard and determined, Ap-

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[5]Motion of LeRoy Investment Co. and Rosehedge Corporation for Leave to Proceed with Sale under Pledge, etc.

pellant and LeRoy sought a Stipulation, and Order which would permit, *among other things,* that they *may* be bidders, or purchasers, at any sale, and that they *may* use on account of any bid or purchase price their respective lien indebtedness, in whole or in part. [R. pp. 60-64.]

This Stipulation, dated June 18, 1956, and the Order of July 6, 1956, merely *permitted* Appellant and LeRoy to utilize these claims, *if they so desired, but did not require them to do so.* Such Stipulation and Order were *then* necessary to protect their rights at any sale held before the validity of their liens was determined; otherwise their objections to Trustee's Petition to sell, free and clear, would have had to be sustained. As stated in 6 Remington on Bankruptcy (5th Ed.), page 103, "But, ordinarily, a sale free and clear will not be ordered, before determination of the validity and priority of liens, over objections of a lien holder who may desire to bid and use the *ascertained* value of his lien in payment."

When the validity of his lien is unchallenged, a lien holder may bid at a sale, free and clear, and may apply the value of his lien upon the purchase price, giving his receipt as payment. (6 Remington on Bankruptcy (5th Ed.), Par. 2958, pp. 113-114; *In re Harralson,* 179 Fed. 490; *Wolffgram v. Marsh,* 280 Fed. 865, 866.) It was this *permissive* right that Rosehedge and LeRoy sought —to be *exercised* by them *only* when and if they *desired* to do so.

Appellee's summary of the Stipulation is both inadequate and incomplete. It, and the July 6, 1956, Order are more fully summarized in Appellant's Opening Brief (pp. 13-14).

However, it is the *actual* events which *occurred* at the *sale* on September 6, 1957,—*not* what the Stipulation *provided*—that is *material here.* The facts are that S. Kohn was bidder and purchaser thereat; that neither her bid nor purchase utilized the value of the LeRoy and

Rosehedge lien claims; on the contrary the bid and purchase were made *expressly subject to such liens;* that both the oral and written bid so provided [R. pp. 111-112; pp. 29-33; Rep. Tr. pp. 10-11, 14]; that the Referee accepted that bid upon *those terms and conditions.* [R. p. 116; Rep. Tr. p. 44, line 23, to p. 45, line 5]; and, that the Referee's Order Confirming Sale so provided; [R. pp. 66-74]; that it was affirmed upon review by the District Court upon those terms and conditions, modified only as to taxes. [R. pp. 128-135.] Appellee's Brief incorrectly states that Appellant and LeRoy were the bidders and purchasers at said sale. S. Kohn was the bidder and purchaser, and even though she was acting on behalf of LeRoy and Rosehedge, the legal consequences flowing therefrom are *different.* (See authorities cited in Appellant's Op. Br. at pp. 57 to 65 incl.)

While the Referee announced at the sale that he was upholding the validity of the LeRoy and Rosehedge lien claims, nevertheless the *amount* of such lien claims was *not fixed or determined until after the bid of S. Kohn had been made, and accepted, and after the sale had been completed.*

It was *thereafter* that the Referee took evidence pertaining to the claims of LeRoy and Rosehedge, and *then* allowed LeRoy $28,087.50, as interest, $15,750.00 as attorney fees, and $3,885.00 for the preservation or protection of the property, and allowed Appellant $15,442.99, as interest, $8,890.00 as attorney fees, and $3,585.00 for the preservation or protection of the property—a total of approximately $75,640.47. These sums were in *addition* to the principal sum of $225,000.00 allowed to LeRoy, and $125,928.66 allowed to Rosehedge on their liens. [Rep. Tr. pp. 47-50; R. pp. 37-42.]

S. Kohn could not utilize the value of Appellant's and LeRoy's lien claims in her bid or purchase, since the *amounts* of such liens claims *were not fixed or deter-*

mined by the Referee *until after* the bid of S. Kohn had been made, accepted, and the sale completed. It cannot be argued successfully, *at least so far as the $75,640.00 is concerned,* that the bid and purchase of S. Kohn utilized this amount, for such sum *was not in existence or determined when the bid was made or accepted.*

Appellee's Brief (p. 4), quoting an incomplete statement made by Mr. Katz, sedulously avoids setting forth the *entire* statement, which conveys a meaning contrary to that asserted by Appellee. The entire statement is as follows, being italicized as to the portion *omitted* by Appellee:

> "We do have an offer that we desire to submit, and our offer is, in effect, to pay the equivalent of roughly five hundred sixty or six hundred thousand dollars, and the reason I say roughly, is because the exact amount would follow the Court's determination of what fees would be allowed on these in connection with the foreclosure of the trust deed, and that would be made up as follows: *we would pay one hundred sixteen thousand cash now, for the assets, free and clear of all lien claims, and encumbrances, excepting only that we would take it subject to the taxes unpaid to the County of Clark, that would be the State, County and City taxes, for the period January 1955 through date, and we would take it subject to that six hundred thousand trust deed and subject to the pledge of that six hundred thousand dollar trust deed to LeRoy and Roschedge in the amounts as shown in the order, your Honor, which I have just handed up to you. As part of that consideration, there would also be conveyed to us—by us, the bidder is a secretary in my office, one Sylvia Cohen—additionally and for the same consideration, which would acquire by bill of sale, all of the right, title, interest in and to the estate of the trustee, in the furniture, furnishings, gaming equip-*

ment and other tangible personal property, subject however to all valid and subsisting conditional sales contracts and chattel mortgages. That is, we do not think we have the right to get that free and clear. And then upon acceptance of the offer we would ask to be put into the peaceful possession of the assets.

"Now, that is in writing, your Honor. Would you like me to file that?" [Rep. Tr. p. 10, line 5, to p. 11, line 10.]

It is self-evident therefrom that the S. Kohn bid did *not* utilize, or attempt to utilize, the value of the LeRoy and Rosehedge lien claims, but on the contrary states that bid was made *subject to such lien claims.* Shortly thereafter, the Referee read aloud the terms of the *written bid* which expressly provides that the bid was made *subject* to the LeRoy and Rosehedge lien claims. [Rep. Tr. p. 14, lines 2, to 22; R. pp. 29-33.] This is not the same as utilizing such lien claims. In any event, the *written* bid, which was filed and accepted, *controls.*

The Referee, in accepting the S. Kohn bid, stated: "The Court will accept the offer of Sylvia Cohen as the best offer for the sale of the premises described in the notice heretofore given in these proceedings, *subject to the terms and conditions of that offer,* and the payment to this Court of a sum of one hundred sixteen thousand dollars." (Italics ours.) [Rep. Tr. p. 44, line 23, to p. 45, line 3.]

Neither does the Referee's statement found in Appellee's Brief (p. 4) change the foregoing, nor does it sustain Appellee's argument. The Referee merely attempted to explain to creditors, in simple language, the *effect* of the bid, and, incorrectly stated that Mr. Katz was bidding in the trust deeds held by Rosehedge and LeRoy, which was not the fact. All the Referee in reality said was that the offer (bid), subject to the liens of LeRoy and Rosehedge, insofar as the rights of creditors and the

bankrupt estates were concerned, was similar, *in effect and in essence,* to bidding in the trust deeds held by LeRoy and Rosehedge, for, in either case, the *effect* was to relieve the bankrupt estates and the Trustees from payment of the amount of such lien claims, and that *all* the Estates *were receiving* was $116,000.00 in cash. As far as creditors and the Bankrupts' Estates were concerned, it was immaterial, whether the lien claims of LeRoy and Rosehedge were utilized, or the property was purchased subject to the liens. In either case the *net amount of cash received* from the sale was the same, *i.e.,* $116,000.00. That was the *important* thing the Referee sought to impress upon the creditors. *He was not then concerned with, nor was any question before him concerning,* any rights, or disputes between Appellant and Appellee respecting their Chattel Mortgages; particularly so, as the personal property was being offered for sale *subject to all valid and subsisting Conditional Sales Contracts and Chattel Mortgages.* [Rep. Tr. p. 13.]

Besides, the *materiality* and *legal effect* of the Referee's statement is *naught.* It *cannot* impeach his Order Confirming Sale, which provides that the property was purchased by S. Kohn *subject to the Rosehedge and LeRoy lien claims.*

As stated in *Mercury Engineering Co.,* 60 Fed. Supp. 786, 788:

> "The Referee speaks to the Court through his Order which grants or denies certain things, and not through the reasons for the Order."

This rule is stated by a District Court of Appeal of California, in *Estate of Swanson,* 171 A. C. A. 474, 480, as follows:

> *"The oral comments of the trial judge do not form a part of the final judgment and cannot be used to impeach the finding and judgment."* (Italics ours).

Appellee mistakenly asserts that the Referee found that Appellant and LeRoy had bid in the amount of the encumbrances held by them, plus an additional $116,000.00. Appellee's reference to the printed record states: "This bid was made subject to the liens and claims of LeRoy and Rosehedge" [R. p. 117]. The matters thereafter set forth constitute the Referee's *expression of opinion,* used by way of example; not a *statement of fact nor a finding of fact.* (For discussion see Appellant's Opening Brief, pp. 21, 22, 23, 34, 53, 55).

This also answers Appellee's fallacious contention that the isolated portion of the Referee's Certificate, (Appellee's Br. p. 5) prepared long *after* his Order Confirming Sale was signed and entered, constitutes a "finding". It is well settled that a Referee cannot make *additional findings of fact after* a Petition for Review has been filed. (*In re Peoria Barumeister Co.*, 138 Fed. 2d 520, 522; 8 Remington on Bankruptcy (6th Ed.) 310).

Appellee argues that Appellant at no time objected to the manner in which the Referee's regarded said bid, and filed no Petition for Review from the Referee's Order. There is no review from the Referee's "statement"; neither can the Referee's statement *impeach* his Order. The Referee's Order Confirming Sale *correctly* adjudicated that the property was sold to S. Kohn *subject to the Rosehedge and LeRoy lien claims.* Therefore, Appellant was not aggrieved thereby, and could not review such Order. It is the *Referee's Order,* and *not his statements,* which *determined the rights* of Appellant.

In bankruptcy sales the Referee's Order Confirming Sale *is controlling and fixes the terms of sale, and the rights and obligations of the parties.* (*In re Toledo Co.*, 152 F. 2d 210, 211; *American Dirigold Corp. v. Dirigold Metals Corp.,* 125 F. 2d 446, 454; *In re Rapier Sugar Feed Co.,* 13 Fed. Supp. 85, 89; 4 *Collier on Bankruptcy*

(14th Ed) 1588; *In re Strand Theatre,* 109 Fed. Supp 352).

Further, if, as Appellee contends, the S. Kohn bid and purchase utilized the value of the LeRoy and Rosehedge lien claims, the Referee's Order Confirming Sale *must have so provided. It did not.* Where a bidder uses the value of his lien in payment, the Order Confirming Sale *must so provide.* (4 Collier on Bankruptcy (14th Ed.) 1618).

Appellee concedes that the record does not show the value of the land and Hotel Moulin Rouge [Appellee's Br. p. 5]; yet she seeks to establish such value by the amount of liabilities of the Bankrupts. Value cannot be so determined. The record does show that the LeRoy and Rosehedge foreclosures sales were stayed for approximately two years, in the hope that an advantageous sale would result in something for general creditors; no sale or lease could be obtained, although the Trustee during said period advertised the property for sale extensively throughout the county, in widely circulated newspapers; solicited bids by brochures set far and wide, and actively sought sales or leases. [R. pp. 93-94; 68]. The sale was continued from time to time, because either no bids, or no adequate or substantial bids, were offered or received on the various dates set for the sale. [R. pp. 94; 106-110; Rep. Tr. pp. 16-17]. The Referee's Order recites "the aforesaid bid of S. Kohn was the highest and best bid made at said sale and the highest and best bid which could and can be obtained for said property." [R. p. 70]. The District Court's Order also contains a like statement, and further recites "that none of the Petitioners on Review have shown that any higher or better bid or offer or sale can be had for the property involved herein." [R. p. 132]. Appellee was a Petitioner on Review. [R. p. 75]. Under such circumstances the sale price obtained at the Referee's sale is the *best* and *only* evidence of the value of the prop-

erty *in the record.* Certainly, such value cannot be established by the liabilities of the bankrupts, *who were hopelessly insolvent.* [R. p. 94].

Appellee's statement that LeRoy and Rosehedge were the bidders; that they bid in their respective liens; and that the greatest part of the bid was used in satisfaction of their liens are misleading, and misconstrue the record. Such statements are *contrary* to the evidence, to the terms of the bid, to the Referee's Order, and to District Court's Order.

Appellee's statement, that Appellant and the Referee regarded the S. Kohn bid as utilizing the entire amount of Appellant's and LeRoy's claims, is misleading; certainly no such finding was or could be made.

Appellee's reference to her first Petition for Review cannot assist her herein. This was a review from the Referee's Order of September 6, 1957, upholding the validity of LeRoy's and Rosehedge's liens upon the *real* property. It did not relate to or involve Appellee's, or any other, chattel mortgage. No appeal has been taken from *this* Order and it now is final. [R. 33-48.]

Appellee's statement that the Referee confirmed the sale to Appellant and LeRoy is incorrect; rather the Referee confirmed the sale to S. Kohn, and the personal property was sold *subject to all valid and subsisting conditional sales contracts and chattel mortgages* [R. pp. 66-74]. His Order so provides. [R. pp. 66-74]. The Referee at *no time ruled* that Appellee's Chattel Mortgage was superior to that of Appellant; no such issue or question was before the Referee on September 6, 1957; no hearing, adversary or otherwise, was or could be had thereon, since Appellee was not even present or represented at the sale. Besides any issue relating to the validity or priority of their respective Chattel Mortgages at the sale would have been improper, (8 C. J. S. 1044).

Appellee's Petiton for Review never asserted that her Chattel Mortgage was superior to that of Appellant. No such ground of review, or contention, is stated, or set forth in her Petition [R. pp. 75-81.] (See Point III Appellant's Op. Br. pp. 43-45; pp. 19-21.) The incorporation by reference of Appellee's First Petition for Review, into her Petition for Review from Referee's Order of September 23, 1957, did not aid Appellee. The various grounds for review set out in this Petition (summarized in Appellant's Op. Br. pp. 19, 20 and 21 thereof) were directed to the Referee's Order of September 6, 1957, *not* to the September 23, 1957 Order, and constituted a collateral attack upon the first Order; they were unavailing, as her Petition for Review from Referee's Order dated September 23, 1957 was filed *more than ten days after* filing of Referee's September 6, 1957 Order (*In re Wyoming Valley Collieries Co.*, 29 Fed. Supp. 106, 107, 108; 11 U. S. C. A., Sec. 67c; Bankruptcy Act, Sec. 39c). The *only* grounds in her Second Petition, which were directed to the September 23, 1957 Order, assert that the bid of and sale to S. Kohn violated the Order of July 6, 1956,—an untenable position rejected by the District Court on Review. There is not even a *mention* in her Petition that the Sterrett Chattel Mortgage was prior or superior to that of Appellant. In fact Appellee in her Petition for Review asserts (Spec. 7a) that the offer made by S. Kohn . . . "was not made free and clear of all liens and was made expressly subject to a trust deed in the amount of $600,000.00 . . . and the assignments thereof to LeRoy . . . and Rosehedge . . . That by virtue of said exceptions, said sale to S. Kohn . . . was not free and clear of all liens." [R. pp. 76-77.] Appellee *now* asserts a position directly contrary thereto. The District Court made *no* implied (or other) *finding* that Appellant had bid in the amount of its lien claim at the sale, or that its claim had been extinguished, or that

Appellant had no further rights under its Chattel Mortgage. There is no recital, statement or findings, in either the Referee's Order, or in the District Court's Order upon Review, that the bid of or sale to S. Kohn used, utilized, or included the value of the LeRoy and Rosehedge claims, or that said sale satisfied and extinguished the Rosehedge lien claim and its Chattel Mortgage. There is no such evidence. There is no such finding. Appellee incorrectly states the record. Her "Statement of Case" should be rejected.

Statement of the Facts From Reporter's Transcript.

A brief résumé of the *material* matters in the Reporter's Transcript discloses that on September 6, 1957, the meeting was called to order and the various parties present noted their appearances in the record. Appellee was neither present nor represented thereat, or during the sale. [Rep. Tr. p. 2, line 16, to p. 3, line 20.] Upon inquiry, the Referee was advised that the proposal, considered at the previous meeting, had not materialized. but was told that if a continuance was had, another plan might be offered. The Referee then asked for offers to purchase the Moulin Rouge property. [Rep. Tr. pp. 3-8.] Mr. Katz then orally announced,[6] and then submitted a written bid in the name of S. Kohn [Rep. Tr. p. 84, lines 10-11.][7]

Trustee's attorney announced that the $116,000.00 offerred would only cover the accrued ($72,000.00) expenses of preservation, and expenses of administration attributable to the sale, and would leave nothing for

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[6]The full text of Mr. Katz's oral statement has been set forth under "Comments on Appellee's Statement of Case."

[7]The Order that is referred to and discussed by both Mr. Katz and Mr. Quittner during this hearing and sale was a proposed, but incomplete and unsigned Order, relating to the LeRoy and Rosehedge Motion and Trustee's Objections thereto. Subsequent to the sale, this Order was completed and signed by the Referee, and is found in the printed Transcript of Record pages 33-48.

junior lien holders and unsecured creditors, that the personal property was encumbered; that Trustee would sell "only his right, title and interest in and to the same, subject to the many conditional sales contracts and chattel mortgages"; that the purchaser would have to follow through on this matter. *"The Trustee would not, because he would have no further interest in it."* [Rep. Tr. pp. 11-13.] (Italics Ours.)

The Referee then read aloud the written bid of S. Kohn [Rep. Tr. p. 14], this provided that S. Kohn offered to purchase all the real property, with its improvements for $116,000.00 cash, free and clear of all liens, claims and encumbrances, *excepting* the following: (1) specified State, County and City taxes; (2) a specified assessment; (3) the $600,000.00 Shulman trust deed; (4) the assignment thereof by Bisno & Bisno, Inc. to Alexander Bisno and Louis Rubin; (5) the assignment and pledge of aforesaid trust deed by Bisno and Rubin to LeRoy; (6) the assignment and pledge of aforesaid trust deed by Bisno and Rubin to Rosehedge; and additionally, and for the same consideration, all of Trustee's right, title and interest in and to the furniture, furnishings, gaming equipment of all kinds, and other tangible personal property pertaining to the business of Moulin Rouge, *subject to all valid and subsisting additional sales contracts and chattel mortgages against the said personal property;* that the sale was to be consummated through, and the purchase price was to be paid in an escrow; that Purchaser was to obtain a policy of title insurance guaranteeing title as set forth in said bid. [R. pp. 29-33.]

The Referee then stated that the bid meant that unsecured creditors and mechanic lien holders would receive nothing; that the $116,000.00 would pay only expenses of administration, which were then about $72,000.00, and including taxes were $122,931.87; that all of this had accumulated since bankruptcy; that the Trustee had done everything possible to sell the property; he had

carried on an extensive advertising campaign in newspapers and by brochures; he had answered hundreds of inquiries and had shown the property to many people; that the Referee had continued the sale from time to time over an extended period, and no acceptable plan was presented, and no acceptable bid was made; that unless some better offer was presented, the Referee would have to accept the S. Kohn bid. Various creditors and attorneys spoke.

The Referee then announced a recess until 1:30 P.M. of said day to permit a requested conference. [Rep. Tr. pp. 15-21.] While the Court was still in session, the Referee asked of Mr. Katz who S. Kohn was, and Mr. Katz replied that she was a secretary in his office, and that she was making the bid as a matter of convenience. (D. C. Order May 28, 1959.)

When Court re-convened, the conference was reported unsuccessful. An oral bid, as a proposed plan, was then submitted. Various objections thereto were interposed. [Rep. Tr. pp. 21-24.] These disclosed that such bid did not constitute a firm bid, or plan, but was incomplete, conditional, contingent and dependent upon various contingencies and uncertainties; that the amount of available cash offered was insufficient to meet the immediate needs of the trustee; that it would require a lengthy continuance, and consent of all lien holders to subordinate their liens to the proposed new trust deed; all without any assurance or hope that a feasible and acceptable plan could or would be presented at a later date. [Rep. Tr. pp. 24-34.]

The Referee stated that without a concrete and definite plan being presented, he could not continue the matter; that during a two year period there had been many hearings and many continuances of the sale, all in the hopes that an adequate bid or concrete plan could be presented, to provide something for unsecured creditors; that the

Trustee had made strenuous efforts to sell the property, but no practical plan had been offered, and that he no longer could continue the sale unless something concrete was presented which would be acceptable to the Court, and to the holders of the trust deeds. The proposed offer or plan was rejected. [Rep. Tr. pp. 34-37.] The Referee then read his decision in another matter. [Rep. Tr. pp. 37-43], and also announced that he was holding that LeRoy and Rosehedge had a first lien upon the Moulin Rouge properties. The Referee then stated: "The Court will accept the offer of Sylvia Cohen as the best offer for the sale of the premises described in the notice heretofore given in these proceedings, *subject to the terms and conditions of that offer,* and the payment to this Court of a sum of one hundred sixteen thousand dollars." [Rep. Tr. p. 44, line 23, to p. 45, line 3.] (Italics ours.)

The bidder, through Mr. Katz, also orally agreed to pay escrow and title charges. [Rep. Tr. p. 45.] A recess was then taken, *following* which evidence was received regarding attorney's fees, interest and expenses incurred and expended for the preservation and protection of the property by LeRoy and Rosehedge. [Rep. Tr. pp. 47-49.] The Referee *then* announced that *his Orders would be* [Rep. Tr. p. 49] that Rosehedge was allowed $15,442.99 as interest, $8,890.00 as attorney fees, and $3,585.00 as costs of preservation, and these items *were to be added* to the principal sum of $125,928.00; that he found that the principal due to LeRoy was $225,000.00, and allowed $28,870.50 as interest (at 6% rather than 11½%); $15,750.00 as attorney fees; and $3,885.00 as cost of preservation to LeRoy. The Referee then completed and signed the proposed Order.[8]

The meeting then adjourned and the escrow was opened. [Rep. Tr. pp. 49-51.]

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[8]This is the Order Granting Motion of LeRoy and Rosehedge for Leave to Proceed, etc. [R. pp. 33-48.]

Supplemental Specification of Error.

The original Specifications of Errors set forth in Appellant's Opening Brief pages 26-35 are still applicable. Only Specification 9 need be enlarged to include additional *material* matters from the Reporter's Transcript, and which are not otherwise found in the record. This Specification provides:

> "9: The portion of the District Court's Order ordering Rosehedge to release its chattel mortgage through escrow to Millie Sterett, a subsequent chattel mortgage claimant, is prejudicially erroneous in that it is not supported by the evidence".

We add the following to the original Specification 9. (Appellant's Op. Br. pp. 31-35):

Mr. Katz, in announcing S. Kohn's bid, stated such bid *in effect* was to pay the *equivalent* of roughly $560,000.00 or $600,000.00 (these sums were mentioned merely as the guide to any other prospective bidders present who may have desired to make a bid for the property free and clear of liens), and he then proceeded to outline the terms of such bid, *i.e.,* payment of $116,000.00 cash for the assets which would be taken *subject to* certain taxes, *subject to* the Shulman $600,000.00 trust deed, and *subject to the LeRoy and Rosehedge pledges thereof* to the amounts of their then undetermined lien claims and the personal property *subject to* all valid and subsisting conditional sales contracts and chattel mortgages. Mr. Katz *did not state* that such amount ($560,000.00 to $600,000.00) was then being bid, by his bidder, or that the bidder was utilizing the amount of the lien claim of LeRoy and Rosehedge in the bid. This could not be done, for *at that time* the full amount of such lien claims were undetermined, unliquidated and not ascertained, and there could be no valid or acceptable bid in an indefinite, undetermined and unliquidated amount.

A bid at a public sale must be in a definite sum. Besides the latter and more *specific* part of his statement, detailing the various items making up the bid, control over the more general first portion of his statement. Further, said announcement made reference to a *written* bid, which was *filed,* [Rep. Tr. p. 11], *read* aloud, [Rep. Tr. p. 4] and *accepted* by the Referee [Rep. Tr. p. 44], and provided that the bid was made *subject to the lien claims of LeRoy and Rosehedge.* This written bid superseded any oral statement of its contents. It was this written bid which was filed and accepted. [Tr. pp. 43-44.]

The Referee's statement was that *in essence* Mr. Katz was bidding in the trust deeds, *not that in fact* Mr. Katz was bidding in such trust deeds. The Referee was then attempting to state in simple language the *essence* and *effect* of such bid,—*not its exact terms,*—for it was immaterial to either creditors, or to the Referee, whether the bid utilized the lien claims of LeRoy and Rosehedge, or that the bid offered to purchase the property *subject* to such lien claims. As far as rights of creditors and the bankrupt estates were concerned, the net result was the *same;* in either case the lien claims would not be payable from the proceeds of sale, or by the bankrupt estates; in either event the amount of cash received by the Trustee would be identical, and would constitute the *only money available* for payment of Trustees' obligations, and creditors' claims. *That was the important thing the Referee sought to convey to the creditors.*

In any event, both Referee's and Mr. Katz's statements became *merged* in the Referee's Order, and cannot now be used to impeach his Order Confirming Sale (and affirmed on review, except modified as to taxes) to show that the property was sold to S. Kohn *other than subject to the LeRoy and Rosehedge lien claims.*

Also the Referee accepted the bid *"subject to the terms and conditions of that offer"*—being the written offer previously read and filed. [Rep. Tr. pp. 43-44.]

Additionally, the total amount of the LeRoy and Rosehedge lien claims had not been ascertained, determined, fixed, or awarded at the time the bid was made and accepted; *thereafter, more than $75,000.00 was added* to the amount of these claims as they *existed at the time* the bid was *made* and *accepted,* and the *principal* amount of the LeRoy claim was *then* fixed. The Referee's Order which allowed the total amounts of the LeRoy and Rosehedge claims *was completed and signed after the said bid was made and accepted.* Obviously, it would have been *impossible* for S. Kohn to have used or utilized the full amount of the LeRoy and Rosehedge claims in her bid. They were then *undetermined* and *unliquidated,* both as to *allowable items* and in *amounts.*

ARGUMENT—POINTS AND AUTHORITIES.

I.

Appellee Has Not Presented Any Evidence or Law to Sustain Her Contention That Appellant's Lien Claim Was Satisfied and Extinguished by the Bid and Sale. Such Contention Constitutes a Collateral Attack Upon the Terms of the Sale, the Referee's Order, and That Portion of the District Court's Order From Which Appellee Has Not Appealed.

Appellee's Brief and contention disregards several important factors herein. This appeal involves *only* that portion of paragraph III of the District Court's Order by which Appellant is aggrieved. [R. pp. 139-140.] *Appellee has not appealed* from the District Court's Order, *or any part thereof. Those other portions of said Order, from which no appeal has been taken, are now final.* A Court of Appeals will *not review* any part of an Order not brought up upon appeal and from which no appeal has been taken. (8 *C. J. S.* 1636; *Evart v. Eloy Gin Corp.* (9th Cir.), 204 F. 2d 712, 716; *City of Long Beach v.*

Metcalf (9th Cir.), 103 F. 2d 493; *Wheeler v. Smith* (9th Cir.), 30 F. 2d 59, 61; *Arkansas Fuel Oil Co. v. Leisk,* 133 F. 2d 79, 81; 2 *Collier on Bankruptcy* (14th Ed.) 970.) In *Evart v. Eloy Gin Corp., supra,* this Court states (p. 716):

> "That part of the claim was decided on the merits adversely to Appellant, and no appeal having been taken it is not before us."

In *Arkansas Fuel Oil Co. v. Leisk, supra,* page 81, we find:

> "In the absence of a cross-appeal, Appellee may not attempt either to enlarge his rights under the judgment appealed from, or *lessen* the rights of his adversary." (Italics ours.)

The statement of facts and recitals in Referee's Order Confirming Sale[9] [R. pp. 67-70], and reaffirmed in the District Court's Order[10] stating "that the statement of facts and recitals of the proceedings had, as set forth in the aforementioned Referee's Order . . . are correct, and by reference made a part hereof," and the other recitals therein contained [R. pp. 128-133] *cannot now be challenged by Appellee. Such recitals import absolute verity.* (*In re Trumbal,* 55 F. 2d 165; *Mayfield v. Aetna Life Ins. Co.,* 100 F. 2d 199; *Wall v. United States,* 97 F. 2d 672; *Day-Gormley Leather Co. v. Nat'l City Bank,* 89 F. 2d 703; *Snider v. Sand Springs Ry. Co.,* 62 F. 2d 635; 36 *C. J. S.* 318.) Likewise, the terms of the sale, *confirmed* by Referee's Order, *and affirmed* by the District Court (modified only as to taxes), and the portions of the District Court's Order from which no appeal has been taken, are now conclusive.

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[9]Summarized in Appellant's Opening Brief, p. 31.

[10]Summarized in Appellant's Opening Brief, pp. 31-32.

The Referee's Order [R. pp. 66-75] confirmed the sale of the real property to *S. Kohn,* as purchaser, *subject to* the lien and lien claims of LeRoy and Rosehedge [R. p. 72], and the sale of the personal property to *S. Kohn, subject to all valid and subsisting chattel mortgage.* [R. p. 73.] The *unappealed* portion of the District Court's Order expressly affirmed the Referee's Order *in all respects* (modifying it only as to taxes, not involved herein) [R. pp. 134-135], and expressly *adjudged* that the real property was sold *to S. Kohn subject to the LeRoy and Rosehedge liens and lien claims.* [R. pp. 134-135.] The District Court's Order [Par. III] also adjudged "That the Petition for Review . . . filed on behalf of Millie Sterett, be, and the same is hereby dismissed, and the relief sought by said Petitioner . . . is denied, and said Petitioner's objections to the aforesaid Referee's Order . . . are, and each of them is overruled." [R. pp. 135-136.] Appellee cannot now contend otherwise, for such adjudications are now final, and any challenge thereon constitutes a collateral attack upon the unappealed portions of said Order, and upon Referee's Order Confirming Sale.[11]

It is well settled that the validity of the sale, or the terms of the Order Confirming Sale, are not open to inquiry, or impeachment, collaterally, in any proceeding, either in State or Federal Courts. (*Stanley v. Graham Products,* 83 F. 2d 489, 491; *Larkin Green Logging Co. v. Sabin* (9th Cir.), 222 Fed. 814, 816; *In re Ostlind Mfg. Co.,* 19 Fed. Supp. 836; *Miller v. McKenzie,* 217 Cal. 389, 19 P. 2d 1; 4 *Collier on Bankruptcy* (14th Ed.) 1587-1588; 8 *C. J. S.* 1078; 6 *Remington on Bankruptcy* (5th Ed.) 104, 105.)

Throughout her Brief Appellee incorrectly *assumes* that Appellant was the purchaser. S. Kohn was *adjudged* the

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[11]Summarized in Appellant's Opening Brief, pp. 2-3, 18-19.

purchaser both by the Referee's Order and by the District Court's Order. This adjudication is final. However, even if Appellant had been the purchaser (*it was not*), Appellee's contention of merger would not apply; the authorities cited by her hold otherwise. The personal property was acquired by S. Kohn *subject to all chattel mortgages.* Appellee's chattel mortgage was *junior* and *inferior* to Appellant's chattel mortgage.

It is the universal rule that acquisition of the equity of redemption, or title, by the mortgagee, *in his own name,* will not result in a merger, where the continued existence of the mortgage is necessary to protect his lien against intervening liens of junior lien holders. It will be presumed that the mortgagee intended to do what would accord with his best interest, and equity will keep the legal title and the mortgagee's interest separate in order to preserve his superior lien against junior lien holders. The presumption is that *no merger was intended.* (*The Bergen,* 64 F. 2d 877, 880-881; 59 *C. J. S.* 682-683; 33 *Cal. Jur.* 2d 672, and other authorities cited in *Appellant's Op. Br.* pp. 58-65.)

In *Toston v. Utah Mortgage* (9th Cir.), 115 F. 2d 560 (cited by Appellee), it was held that acquisition of the land by mortgagee upon which other liens, did not create a merger. This Court stated:

> "So merger will not be declared in such a case as this if contrary to the intention of the *mortgagee, or against his best interests.*" (Italics ours.)

Likewise in Appellee's cited case, *Guaranty Trust Co. v. Minneapolis, etc. Co.,* 36 F. 2d 747, the Court states:

> "It is only when the fee and the lien center in the *same* person, *without any intervening claims, liens, or equities,* that a merger of title and the lien will take place."

It is true that merger is a question of *intent,* but it is the *mortgagee's intent which controls—he alone has the election.* (59 *C. J. S.* 677; *Guaranty Trust Co. v. Minneapolis etc. Ry. Co., supra; The Bergen, supra.*)

Particularly, there is no merger when conveyance is made to, or title is taken in the name of, a *third* person—even the *agent* of or *Trustee* of the *mortgagee.* (See autorities cited in Appellant's Br. pp. 60-63.) *Humrich v. Dalzell,* 166 Atl. 511, 512, 113 N. J. Eq. 310, is factually similar and directly in point.

Appellee's summary of the "evidence" fails to sustain her contentions.

Her partial and incomplete quotation of Mr. Katz's announcement of the S. Kohn bid—properly analyzed and read in the light of the entire statement—conveys a meaning *contrary* to that urged by Appellee. In the omitted and latter portion of the statement, Mr. Katz outlined the exact terms of the bid—the payment of $116,000.00 cash for the assets, *subject to the LeRoy and Rosehedge pledges and lien claims* (among other things) and for the personal property *"subject* to all valid and subsisting . . . chattel mortgage." [Rep. Tr. pp. 10-11.]

This *entire* statement cannot as a matter of law sustain Appellee's construction. The generalized first part of the statement (quoted by Appellee) is controlled and *limited* by the more specific latter portion thereof. 17 *C. J. S.,* Contracts, p. 732, states: ". . . and in a like manner general expressions will be restricted to particular descriptions or additions following them." *Standard Steel Car Co. v. United States,* 67 Ct. Cl. 445, 480, states this rule: "General provisions . . . when in conflict with particular specifications thereof following later . . . *must yield to latter."* (Italics ours.) Mr. Katz *specifically* stated that the offer was to purchase the assets for $116,000.00 cash, *subject to the LeRoy and Rosehedge lien claims.* A party purchasing property subject to liens

is bound *only* to the extent of the property. (*Brichetto v. Raney*, 76 Cal. App. 232, 247, 245 Pac. 235.) The term *"subject to"*, in legal parlance, connotes an *absence* of personal liability. (*Helvering v. S. W. Consolidated Corp.*, 315 U. S. 194, 200, 86 L. Ed. 789, 795.) It also means "charged with". (*Sanitary Appliance Co. v. French,* 58 S. W. 2d 159, 163.) Thus, the offer was to pay $116,000.00 for the assets charged with the liens and lien claims of LeRoy and Rosehedge, without personal liability therefor on the part of S. Kohn—the bidder. Even the first portion of Mr. Katz' statement cannot sustain Appellee's interpretation. The term "in effect" means "a consequence produced"; "a result that follows" (29 *C. J. S.* 835), and "equivalent" means "equal in value—equal in force or authority." (Vol. 1, Webster's New International Dictionary Unabridged, 2d Ed., p. 65.) Properly construed, Mr. Katz' announcement was that the offer would produce a result equal in value roughly to $560,000.00 or $600,000.00, and this offer consisted of payment of $116,000.00 cash for the assets, *subject to* and *charged with* certain taxes (approx. $52,000.00) the Schulman trust deed, and the lien and lien claims of LeRoy and Rosehedge—subsequently and following the sale, adjudged to be $427,568.15. Such a bid would be equal in value, roughly, $560,000.00 to $600,000.00. By acquiring the property *subject to* taxes and the LeRoy and Rosehedge lien obligations, the estate and creditors would benefit to the extent of those amounts—equivalent to $479,569.16—because the assets acquired were subject to and charged with such lien debts, and the Trustee and bankrupt estates *would be relieved* from the payment of these obligations. This type of bid produced a result equal in value roughly between $560,000.00 and $600,000.00, *but* in so doing, the *bid did not utilize the value of the LeRoy and Rosehedge lien claims.* The land was still *charged therewith.* If the bid had utilized the value of such lien claims the amount

thereof would have had to be in an amount equal to the *sum total* of the cash, and total sums of the LeRoy and Rosehedge claims. The bid was not for such total sum. It did not, and could not include, or utilize, the value of said lien claims, for the amounts thereof were *then undetermined and unascertained.*

Neither does the Referee's statement, that *in essence* Mr. Katz was bidding in the trust deeds of LeRoy and Rosehedge, aid Appellee, or bind Appellant. All that Referee was stating, in effect, was that the estates and trustee did not have to pay the LeRoy and Rosehedge lien claims, and that the Trustee was receiving only $116,000.00, in cash. It was immaterial to the Referee, Trustee and creditors whether the bid was *subject to* the LeRoy and Rosehedge lien claims, or utilized them, for in either event, $116,000.00 was the only cash the Trustee was receiving, and *that* was the only *thing of importance* to the creditors. There was then no proceeding before the Referee determining the rights, claims, or priorities, *between Appellant and Appellee,* of their chattel mortgages. Besides, the Referee further announced that he accepted the bid of S. Kohn as the best offer *"subject to the terms and conditions of that offer" i.e.,* the *written* bid on file and previously read aloud.

Finally, the Referee's statement (upon which Appellee relies) was *merged* into the Referee's Order. This provided that the premises were purchased by *S. Kohn, subject to the lien and lien claims* of LeRoy and Rosehedge (among other things). It cannot now be used to impeach his Order. As stated in *Mercury Engineering Co.,* 60 Fed. Supp. 786, 788, "The Referee speaks to the Court through his Order which grants or denies certain things, and not through their reasons for the Order." A California District Court of Appeal in *Estate of Swanson,* 171 A. C. A. 474, 480 stated, "The oral comments of the trial judge do not form a part of the final judgment and cannot be

used to impeach the findings and judgment." The Supreme Court of the State of California succinctly states the rule in *DeCou v. Howell,* 190 Cal. 741, 750, 214 Pac. 444, as follows:

> "The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court. *To hold that oral* or written *opinions or expressions* of judges of trial courts may be resorted to to overturn judgments would be to open the door to mischeivous and vexatious practices. Neither a juror nor *a judge* is permitted to *impeach* his verdict or judgment." (Italics ours.)

Mr. Katz' oral statement also became merged into the "written bid," and into the Referee's Order confirming the sale upon the terms of the *written bid.*

Neither Appellee's claim that Appellant and LeRoy had informed the Referee that they desired to utilize the value of their claims in any bid, or in payment of the purchase price, if they were the successful bidders, nor the ensuing stipulation, or Court Order of July 6, 1956, support Appellee's position. Such statement was *not made at the sale, but approximately a year and a half prior thereto,* and at a time, and under entirely different circumstances previously detailed herein, under "Comments on Appellee's Statement of Case." This statement requested, and the ensuing Stipulation and Court Order provided merely a "permissive right." It was *not mandatory* that this right be enforced. It *never was exercised. S. Kohn, not* LeRoy and Rosehedge, was the *bidder* and *purchaser* at the sale. The Referee's Order, and the District Court's Order so provide *and so adjudicate.* This is now *conclusive.*

Appellee *incorrectly* asserts that Appellant and LeRoy acquired the principal assets of bankrupts "free and clear of all liens." Referee's Order Confirming Sale [R. pp. 71-73], and District Court's Order affirming same, *adjudged* [R. p. 135] that the real property was purchased *by S. Kohn, subject* to the lien of certain taxes, the Shulman Trust Deed, and the LeRoy and Rosehedge liens and lien claims; that the personal property was purchased "subject to all valid and subsisting . . . chattel-mortgages" thereon. Appellee's only lien was an inferior chattel mortgage upon the *personal property*. Her present contention is contradicted in her Petition for Review [R. pp. 75-81] wherein [spec. 7a; R. pp. 76, 77], as a ground for reversal, she alleges the offer made by S. Kohn *"was not made free and clear of all liens, and was made expressly subject to a trust deed in the amount of $600,000.00 . . . and the assignments hereof to LeRoy and Rosehedge.* . . . That . . . said sale of S. Kohn *was not free and clear of all liens."* This, she asserted violated Referee's July 6, 1956 Order. Appellee's inconsistencies but exemplify her fallacious contentions herein.

Appellee's Brief (p. 5) concedes that the record does not reflect the value of the Moulin Rouge property, but seeks to establish such value by the *liabilities* of the bankrupts, who were "hopelessly insolvent." [R. p. 94.] Value cannot be so determined. Not only is her argument based thereon fallacious, but it *dehors* the record, and cannot be considered (*In re Paley,* 26 Fed. Supp. 952), and her authorities thereon are both distinguishable, and inapplicable.

Appellee erroneously argues that the Referee found that Appellant and LeRoy had utilized the entire amount of their claims by the bid of S. Kohn, and relies upon an isolated portion of the Referee's Certificate on Review [R. p. 117] wherein Referee stated that *the bid was made*

subject to the liens and claims of LeRoy and Rosehedge, and *by way of an example,* illustrated that no prejudice resulted to creditors, the Trustee, or the bankrupt estates, *by such bid,* as the amount received therefrom, in the Referee's *opinion,* was the *equivalent* "equal in value" to a bid utilizing the value of the LeRoy and Rosehedge lien claims, since the net amount of money received in *either* case was the *same,* and in *either* case the Trustee, and the estates were *not* required to pay the lien claims of LeRoy or Rosehedge. This was a statement of opinion, not a finding of fact. *It was made long after the Review was taken.* A Referee cannot make *additional findings* of fact *after* the Petition for Review is filed. (*In re Peoria Braumeister Co.,* 138 F. 2d 520, 522; 8 *Remington on Bkcy.* (6th Ed.) 310.)

Appellee tenuously argues that under Sec. 39a(8) Bankruptcy Act (U. S. C. A. Sec. 67a(8) (which provides that Referee shall, among other things, transmit to the Clerks "the findings and orders thereon") the Referee's aforesaid "statement" from his Certificate constitutes a "finding of fact." This is not correct. The findings referred to in the aforesaid section are those findings made upon *disputed facts before* the Order is signed—those findings upon which the Order is *based.* Such provision of the Act does not mean that the Referee shall make his findings in his Certificate on Review. This would be too late and cannot be done. (*In re Peoria Braumeister Co., supra;* 8 *Remington on Bkcy.,* (6th Ed.) 310.) The findings therein mentioned are those required by Rule 52a Federal Rules of Civil Procedure (28 U. S. C. A.) providing that "in all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and *direct the entry of the appropriate judgment.*" Rule 52a, however, applies only in *contested* matters upon *disputed questions of fact.* (*Fontes v. Porter* (9 Cir.), 156 F. 2d 956;

Matton Oil Transfer Co. v. The Dynamic, 123 F. 2d 799; 2 *Collier on Bankruptcy,* (14th Ed.) 1494) Rule 52a is applicable in bankruptcy proceedings (General Order 37) (U. S. C. A. fol. Par. 53; *Perry v. Bauman,* (9 Cir.) 122 F. 2d 407; *Rosenberg v. Heffron* (9 Cir.) 131 F. 2d 80; *In re Cesari,* 217 F. 2d 424, 427.)

No findings were required upon any matters now urged by Appellee. Appellee was neither present nor represented at said sale. There were no adversary proceedings, or any contested matters, between Appellee and Appellant, *before* the Referee; nor were there any questions of *disputed facts* before him upon any of the matters *now urged* by Appellee. General Order 47 (U. S. C. A. fol. Sec. 53) therefore is not applicable. The presumption of correctness of the Referee's findings does not extend to his conclusions. (*In re Harnick,* 151 Fed. Supp. 504.) The Referee's "statement" in his Certificate, is but his *conclusion* that said bid was the equivalent of utilizing the value of the LeRoy and Rosehedge lien claims. This "statement" in Referee's Certificate, is not, and cannot be upheld as a *finding of fact.*

Appellee's attempted distinction of the *Braumeister* case is without merit. This case clearly holds *that a referee cannot make findings after a Petition for Review is filed.*

Appellee's contentions regarding merger are fully answered, both herein and in Appellant's Opening Brief (Point VI pp. 58-65), together with the applicable authorities. Appellee has cited no contrary authorities. Her argument ignores the fact that the chattel mortgage held by her is junior and inferior to the chattel mortgage held by Appellant; that in such instances, the law is clear that merger is never presumed, even when the equity of redemption, or legal title is acquired by the *mortgagee.*

Appellee concedes that the S. Kohn bid for the property, *subject to the liens of Appellant and LeRoy* is an "indicia of intent" not to create a merger, but contends

that merger is a question of intent, and intent is a *question of fact.* In addition to such bid, both the Referee's Order, and the District Court's Order *adjudicated* that the property was acquired by S. Kohn, *subject to the LeRoy and Roschedge liens and lien claims*, and subject to all valid chattel mortgages. As a matter of law, there can be no merger; therefore, in view of the written bid, the Referee's Order and the District Court's Order what evidence has Appellee produced to sustain her contentions? The simple answer is *none.* On the question of merger, it is the *mortgagee's intent* that governs—he alone has the election to prevent a merger and keep the mortgage alive. (59 *C. J. S.* 677; *The Bergen* (9 Cir.), 64 F. 2d 877, 880, 881; *Guaranty Trust Co. v. Minneapolis Ry. Co.*, 36 F. 2d 747, 764; *Toston v. Utah Mortgage Loan Corp.*, 115 F. 2d 560, 562.) By asserting that intent is a question of *fact*, Appellee *concedes* that the District Court erred in holding *as a matter of law*, that the bid of and sale to S. Kohn extinguished Appellant's chattel mortgage by merger. Appellee seeks to escape the rule that a conveyance or transfer of the equity of redemption to an agent or trustee does not create a merger, by asserting that there is no showing that S. Kohn was either the agent or trustee for Appellant—only that the bid was made by her for convenience.

The Sale was *confirmed* to *S. Kohn* by the Referee, and this was affirmed on Review. If S. Kohn was neither an agent of or trustee for Appellant and LeRoy, she then was a stranger and, *as a matter of law*, there could be no merger, for the right or estate previously held, and the right or estate subsequently acquired, *did not coalesce* in the *same* person in the *same* right and in the *same capacity.* (See authorities cited in Appellant's Op. Br. p. 59.)

There is no finding by either the Referee or District Court of intent to merge; neither was the real property

acquired free and clear of liens; it was acquired *subject to the liens and lien claims of Appellant and Rosehedge.* Appellee's *only* lien was that of an inferior chattel mortgage lien holder. Nevertheless the "doctrine of intervening liens" applies to chattel mortgages, and a transfer of mortgaged personal property to *mortgagee, subject to chattel mortgages, evidences an intent that no merger shall be effected.* (*Beecher v. Thompson,* 120 Wash. 520; 207 Pac. 1056, 1057; 14 *C. J. S.* 994.) In *Burton v. Klein,* 239 N. Y. S. 103 the Court held that where a chattel mortgage was given as collateral security with a real estate mortgage, the mortgagee's purchase *at a bankruptcy sale,* and the acceptance of trustee's deed, and a quit claim deed to the premises, from mortgagors, *did not extinguish mortgagor's obligation under the chattel mortgage, through merger. This case is decisive against Appellee's contention.* Most certainly there is no merger when the real property is purchased *by a third person, subject to the lien and lien claims,* and the personal property is acquired, *subject to* all valid chattel mortgages. In such a case there can be no merger.

II.

Appellee Has Failed to Establish That the District Court, as a Bankruptcy Court, Either Had Jurisdiction to Order, or Correctly Ordered, Appellant to Release Its Chattel Mortgage Through Escrow.

The various points set out in Appellant's Opening Brief have been intermingled without sufficient segregation or headings, in Appellee's Brief. This tends towards confusion. Nevertheless, Appellee's reply thereto is erroneous, and her authorities are not applicable herein.

Appellant neither denies nor disputes that a District Court can modify a Referee's Order upon Review, provided said Court, as a bankruptcy court, has jurisdiction to determine the matter involved in such modification, or

otherwise modify such Order in accordance with the established law. Such is not the case in the instant appeal. There is no question but that courts of bankruptcy are invested with certain equitable jurisdiction to enable them to exercise original jurisdiction in bankruptcy proceedings. This jurisdiction, however, is not plenary equity jurisdiction, but only such equity jurisdiction as will empower the bankruptcy court to employ rules and principles of equity jurisprudence in the exercise of bankruptcy jurisdiction. (*Evarts v. Eloy Gin Corp.* (9 Cir.) 204 F. 2d 712, 715; *Kaplan v. Guttman* (9 Cir.) 217 F. 2d 481, 485; *Billings Credit Men's Assn. v. Bogert,* (9 Cir.) 5 F. 2d 307, 309; *Smith v. Chase Nat'l Bank,* 84 F. 2d 608, 615) A bankruptcy court has no jurisdiction to determine controversies between adverse third persons in which neither the Trustee nor the bankrupt estate has any interest, and which are not properly a part of bankruptcy proceedings. This includes controversy between adverse third persons relating to their respective rights, liens and priority of liens, which in no way affect the collection of assets, the administration of the estate, or the distribution of assets, and in which the Trustee is not involved. (See authorities, Appellant's Op. Br., pp. 46-51.) In the instant case, the personal property was sold subject to all valid chattel mortgages. The bankruptcy court thus declined to exercise its exclusive power to deal with liens and relegated the holders to enforcement remedies which they would have had available to them had bankruptcy not occurred. (*Gotkin v. Korn,* 182 F. 2d 380 and authorities in Appellant's Op. Br. pp. 46-47.)

Trustee's attorney announced at the sale that the personal property was encumbered, and that Trustee was selling only "his right, title and interest" therein, *subject* to the many conditional sale contracts and chattel mortgages; that if the purchaser was dissatisfied, he would

have to follow through, for *"the Trustee would not, because he would have no further interest in it."* [Rep. Tr. p. 13.] The District Court on Review, was without jurisdiction to order Appellant to release its chattel mortgage in favor of Appellee since this was a collateral controversy between *third* persons in which the Trustee *had no interest,* and over property which had been sold "subject to all chattel mortgages". (Appellant's Op. Br. pp. 36-39; 46-51.) Appellee has cited no applicable authorities to sustain the District Court's jurisdiction. *In re Burton Coal Co.* 126 F. 2d 447, cited by Appellee involved re-organization proceedings wherein approval of the creditors was necessary. To obtain such approval, it was necessary to determine ownership of certain stock, without which the amount of the claims against debtors, could not be ascertained, and the bankruptcy Court could not proceed with re-organization. The Court stated: "Because of such fact, the jurisdiction of a Court of bankruptcy is *extended beyond what it ordinarily would be.* It extends to *such* disputes . . . *without the settlement of which,* re-organization *cannot* proceed." (Italics ours.)

In the instant case the determination of the Sterett controversy was neither necessary nor proper to complete the sale to S. Kohn, subject to chattel mortgages. Such sale preserved whatever rights Appellee had. Appellee asserts that *Bank of America v. Erickson,* 117 F. 2d 796 is directly in point. It clearly is not applicable herein, either factually, or legally. In said case, trustee objected to certain general claims asserting that they were not entitled to parity with other general claims, as they had been subordinated in agreement with the Creditors committee, in an assignment for the benefit of creditors. This Court correctly held that creditors, by agreement, could subordinate their claims to claims of other creditors, and that such an agreement would be upheld in bankruptcy. No such, or similar facts, or questions, are involved herein.

Other authorities cited by Appellee, related either to cases in which the *Trustee,* in *adversary proceedings with the creditor* challenged the liens, or claims; in others, the Trustee opposed the filing of a new claim, under the guise of an amended claim, after the six-month period had expired. No such or similar facts or adversary proceedings are involved herein.

Appellee does not cite a single authority which holds that she was "aggrieved" by the sale of the personal property "subject to all valid chattel mortgages". She seeks to distinguish without success, a few of the many authorities cited by Appellant which unequivocally hold that a chattel mortgagee is *not* aggrieved by a sale of personal property, subject to chattel mortgages. Clearly Appellee did not have a right of review.

Appellee also urges that she was not estopped from reviewing the Referee's Order of Sale. Estoppel, she states, is a question of fact. The Referee, in his Certificate, stated that she was estopped from review. [R. p. 120.] Under the unchallenged authorities Appellee was estopped; she was neither present or represented at the sale; she interposed no objection to either the S. Kohn bid, or to the acceptance thereof, or to the Order Confirming Sale prior to the signing by Referee thereof. Under these circumstances, the authorities unanimously hold that Appellee was estopped to review the Order. This doctrine of estoppel is based upon logic, and the necessities of progress in the administration of justice. (See authorities Appellant's Op. Br. pp. 40-43.) Appellee has not cited a single authority to the contrary.

There is no merit in Appellee's contention that the Referee found that she was not estopped. He stated the contrary. [R. p. 120.] Her reference to Petition for Review from the September 6, 1957 Order is unavailing. This involved a review from a *different* Order, relating only to Appellant's and LeRoy's *liens upon the real property*; it in no way related to Appellee's chattel mortgage.

Appellee finally asserts even if her Petition for Review was insufficient, the District Court could consider said Petition. In certain instances where the specification of errors in the Petition are not specific enough, and error unquestionably appears in the record, the District Court may review the Order involved. "This does not mean, however, that questions foreign to the record, and presented neither by testimony, nor the pleadings, will be considered." (2 *Collier on Bankruptcy* (14th Ed.) 1497.)

In *In re Paley,* 26 Fed. Supp. 952, the Court states: "In reviewing the Order . . . the Court is *limited* to the *record before the Referee. No notice may be taken* of the *additional allegations of fact made in this Court on oral argument or in briefs.* (Italics ours.)

And *In re Sam Z. Lorch & Co.,* 199 Fed. 944, the Court rejected a Petition for Review, stating: "Besides, the validity of the mortgage was *not assailed* in the Trustee's pleadings on either of *those grounds,* and we do not doubt in this instance that the question before us on the Petition for Review *should be limited* to those *involved in the issues made before the Referee."* (Italics ours.)

These authorities are particularly applicable herein.

We submit that Appellee has completely failed to answer or refute, either by logic, or by applicable authorities, the points raised, the arguments made, and the authorities cited in Appellant's Opening Brief.

Conclusion.

We respectfully submit that for the reasons, and upon the grounds herein, and in Appellant's Opening Brief, set forth, that the portion of the District Court's Order, from which Appellant has appealed, be reversed; that such portion be stricken from the District Court's Order, and that Appellant recover its costs of appeal herein.

Respectfully submitted,

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